THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 24.04.2007

+ **CRL.REV.P.275/2006**

MR SUKHDEV YADAV @ PHALWAN ... Petitioner

- versus -

THE STATE OF U.P. ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Sushil Bajaj with Mr Vijayender Kumar and Mr Vijay Arora.
Respondent/State : Ms Mukta Gupta.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. This revision petition is directed against the order on charge and the charge framed on 13.4.2006 by the learned Additional District & Sessions Judge, Patiala House, New Delhi against *inter alia*, the petitioner. The charge framed against the petitioner (Sukhdev @ Pahlwan) reads as under:-

> "Firstly, that you alongwith co-accused Vikas Yadav and Vishal Yadav kidnapped/abducted Nitish Katara from Diamond Palace, Shastri Nagar within the jurisdiction of PS Kavi Nagar, Ghaziabad on the night of 16th & 17th Feb.,

2002 at about 12:30 (midnight) with the intention to murder him and thereby you committed offence punishable U/s 364 r/w Sec. 34 IPC and within my cognizance.

Secondly, that you alongwith co-accused Vikas Yadav and Vishal Yadav after kidnapping Nitish Katara, killed him, with intention to kill him on 17/2/02 at a place around or near Khurja, Bulandshahar or Khurja Pahasu Road, UP and thereby you both committed offence punishable U/s 302 r/w Sec. 34 IPC and within my cognizance.

Thirdly, that after murdering Nitish Katara, you alongwith co-accused Vikash Yadav and Vishal Yadav removed all signs of identification including clothes from his body and poured inflammable material on his body and burnt his body on the abovesaid Khurja – Pahasu Road and caused evidence of murder disappear with the intention of screening yourself and your co-accused from legal punishable and thereby committed an offence U/s 201 IPCV and within my cognizance.

I hereby direct that you be tried by this court for the above mentioned offence."

2. The case arises out of FIR No. 192/2002 registered under Sections 364, 302, 201 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as the IPC) at Police Station Kavi Nagar, Ghaziabad, U.P. Though, the FIR was registered in U.P., the trial of the case is being conducted at New Delhi.

3. The facts, as noted in the impugned order on charge, are that the deceased Nitish Katara and Bharti Yadav (sister of accused Vikas Yadav) studied together at IMT, Ghaziabad and had fallen love with each

other. Apparently, this affair was not to the liking of Bharti Yadav's brother Vikas Yadav and her cousin Vishal Yadav. On 16.2.2002 one Shivani Gaur, who was a friend of both Nitish Katara and Bharti Yadav, was to get married at Diamond Palace, Shastri Nagar, Ghaziabad. Both, Nitish Katara and Bharti Yadav, along with other friends and family members of Bharti Yadav were invited for the said wedding. According to the prosecution, the petitioner (Sukhdev Yadav) also attended the said wedding along with the other co-accused – Vikas Yadav and Vishal Yadav. The investigation revealed that the petitioner (Sukhdev Yadav) was a resident of Dewaria and was an employee of the Yadav family. Investigations further revealed that while Nitish Katara was accompanying his friends at the wedding party, he was called away by the petitioner and other co-accused and was taken away by them. According to the prosecution, there are witnesses who saw all the accused persons leaving along with Nitish Katara in a Tata Safari around 12:15 a.m. Thereafter, Nitish Katara was not traceable. After about 2/3 days Nitish Katara's dead body was recovered in a burnt condition on the Khurja Phahasu Road. The co-accused Vikas Yadav and Vishal Yadav were arrested by the Madhya Pradesh Police at Dabara Gwalior in an Arms Act case and, thereafter, they were arrested in the present case by

the U.P. Police. The petitioner (Sukhdev Yadav) absconded till he was arrested on 23.2.2005.

4. The learned Additional Sessions Judge, in the impugned order on charge, noted that there is no eye witness to the alleged murder of Nitish Katara and that the entire case is based on circumstantial evidence and particularly on last seen evidence. The prosecution places reliance on the statement of witness Ajay Kumar who, in his Section 161 Cr.P.C. Statement, is reported to have stated that on the intervening night 16-17.2.2002, he was traveling on his two wheeler (Scooter) from 47th Battalion, PAC Quarters towards Delhi when, around 12:30 a.m. at the Hapur Toll Tax Crossing his scooter broken down. Shortly thereafter, a Tata Safari driven by the accused Vikas Yadav came from behind from the direction of Police Station Kavi Nagar, Ghaziabad and the said Vikas Yadav asked him to remove his scooter immediately. It is stated that the said Ajay Kumar saw one person who had a round face and a fair complexion and was wearing a red Kurta and who had covered his shoulder with a white shawl sitting next to Vikas Yadav in the Tata Safari. The said witness (Ajay Kumar) has also reported to have seen Vishal Yadav and the petitioner on the back seat. According to the prosecution, the said Ajay Kumar subsequently identified the said person

with a round face and fair complexion as Nitish Katara on seeing the photograph of the deceased (Nitish Katara) being flashed again and again in the newspapers and on the T.V. It is, *inter alia*, on the basis of the last seen evidence of this witness (Ajay Kumar) that the present petitioner is bring implicated in the present case.

5. It appears that a statement of one Kamal Kishore, who was the Security Guard at the house of D.P. Yadav (Vikas Yadav's father) was also recorded by the police. As per the said statement of Kamal Kishore, it appears that he had seen the deceased Nitish Katara in the company of accused Vikas Yadav and his driver Anil at the house of accused Vikas Yadav between 1-1:30 a.m. on 17.2.2002.

6. It is contended by Mr Sushil Bajaj, the learned counsel for the petitioner that the statement of Kamal Kishore makes it clear that the deceased Nitish Katara was last seen alive by Kamal Kshore and he saw him in the company of Vikas Yadav and his driver Anil. The witness Ajay Kumar who alleges to have seen the deceased Nitish Katara cannot be regarded, in the presence of the statement of Kamal Kishore, to be the witness who had last seen the Nitish Katara as alive. The alleged sighting by Kamal Kishore is later in point of time to that of Ajay Kumar. According to Mr Bajaj, this in itself is sufficient for the discharge of the

petitioner, at least, insofar as the charge under Section 302/34 is concerned. According to him, when Kamal Kishore allegedly saw the deceased Nitish Katara in the company of co-accused Vikas Yadav at around 1-1:30 a.m. the petitioner was not with them. Therefore, it can be safely assumed that the deceased Nitish Katara was last seen alive in the company of Vikas Yadav alone as shortly after Vikas Yadav arrived at his house along with his driver and Nitish Katara, Vikas Yadav left with the deceased Nitish Katara leaving behind the driver Anil who went to his quarters to sleep.

7. Mr Bajaja submitted that since the prosecution has taken the statement of both Ajay Kumar and Kamal Kishore and since the statement of Kamal Kishore is with regard to an incident which is subsequent in time, it is Kamal Kishore's statement alone which would be taken as the last seen evidence. That being the case, according to Mr Bajaj, the petitioner cannot be charged of the evidence under Section 302/34.

8. Ms Mukta Gupta, who appeared on behalf of the State submitted that two views are possible in this case depending on whether the statement of Kamal Kishore or the statement of Ajay Kumar is to be

relied upon. She submitted that where two views are possible and there is a grave suspicion, then a charge can certainly be framed. It is not the case of a judgment after a full fledged trial where, if two views are possible, the benefit goes to the accused. She also submitted that the Mobile phone records of Nitish Katara show his presence at Ghaziabad and makes the statement of Kamal Kishore who is an employee at Vikas Yadav's father's house, doubtful. The possibility of the said witness attempting to deflect the case cannot be ruled out at this stage. Ms Mukta Gupta further submitted that there are other witnesses including two police constables as well as Bharti Yadav who saw the deceased Nitish Katara being taken away from Diamond Palace, Ghaziabad by the accused including the petitioner. Mr Bajaj had submitted that when Nitish Katara left Diamond Palace, Ghaziabad even as per the prosecution case there did not appear to be any indication of inducement having been applied and, therefore, the case was not even covered under Section 364 IPC. Ms Gupta submitted that it is not at all necessary that there there must be visible indications of threat or force. She submitted that force or coercion has to be inferred from the circumstances. The deceased was in the wedding party. He was called out and taken away and when his friends tried to contact him, he did not speak to them.

9. The learned counsel for the intervener (the mother of deceased Nitish Katara) was also heard. His submission was that Kamal Kishore's statement was allegedly recorded on 18.2.2002. Yet another statement was recorded on 18.2.2002 itself which was identical to the earlier statement but in question and answer format. The second statement was signed by Kamal Kishore. He submitted that under Section 162 of the Code of Criminal Procedure, 1973, there is a prohibition from signing statements made before police officers in the course of the investigation. Yet the signatures of the said Kamal Kishore was taken. According to the learned counsel for the intervener, this was done to pressurize the said witness and to compel him to stick to the statement made therein.

10. I have given my thoughtful consideration to the facts and circumstances and the submissions made by the learned counsel for the parties. Various decisions were also referred to by counsel on both sides. However, I feel that it would not be necessary to refer to them. While at first blush it does appear that the petitioner was not last seen in the company of the deceased Nitish Katara, this does not appear to be the full story. As to how Kamal Kishore's statement and/or evidence stands up in the course of a trial is not known. It is quite possible that Kamal

Kishore may not stand by the statement made before the police. If that happens and if Ajay Kumar's statement stands in the course of the trial then there is every likelihood that the petitioner may be convicted. At the stage of framing of a charge all that is necessary is that the material on record taken at face value must point in the direction of the petitioner being involved in the commission of the crime. Even if the Court has a grave suspicion that an accused is so involved then a charge may be framed. I have considered this matter from all angles and have been unable to rid myself of the lurking and grave suspicion that the petitioner is involved in the commission of the alleged crime. It is an entirely different matter that the suspicion may be proved wrong on the basis of evidence on record in the course of the trial, but, at this stage, it cannot be said that the petitioner ought to be discharged.

11. In view of the foregoing discussion, I feel that no interference is called for with the order on charge or the charge framed on 13.4.2006 by the learned Additional Sessions Judge. This revision petition is dismissed. It is made clear that all observations made in this order are only for the purpose of considering the question of charge and shall have no bearing in the trial of the case.

BADAR DURREZ AHMED
(JUDGE)

April 24, 2007
J